

**IN THE UNITED STATES DISTRICT COURT
OF THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

BLUE SPIKE, LLC, <i>Plaintiff,</i>	§	
	§	
	§	
v.	§	Case No. 6:15-cv-584
	§	
AUDIBLE MAGIC CORPORATION <i>Defendant.</i>	§	
	§	

AUDIBLE MAGIC CORPORATION <i>Counterclaim Plaintiff,</i>	§
	§
	§
v.	§
	§
BLUE SPIKE LLC, BLUE SPIKE, INC. and SCOTT A. MOSKOWITZ <i>Counterclaim Defendants.</i>	§
	§

**ORDER ADOPTING REPORT AND RECOMMENDATION
OF THE UNITED STATE MAGISTRATE JUDGE**

The above-entitled and numbered civil action was referred to United States Magistrate Judge Caroline M. Craven pursuant to 28 U.S.C. § 636. The Report of the Magistrate Judge which contains her proposed findings of fact and recommendations for the disposition of such actions has been presented for consideration. Blue Spike, LLC filed objections to the Magistrate Judge's Report and Recommendation denying Motion for Summary Judgment on Audible Magic's Counterclaims 9-13.¹ Audible Magic filed a response to Blue Spike's objections. The Court conducts a *de novo*

¹ Audible Magic separately moved to dismiss counterclaim 12, infringement of Audible Magic's '308 patent, but without prejudice. On February 26, 2016, the Magistrate Judge issued a separate Report and Recommendation, recommending Audible Magic's motion for voluntary dismissal without prejudice be granted and that Audible Magic's infringement counterclaim be dismissed without prejudice (Dkt. No. 78). Blue Spike has filed objections to that Report and Recommendation, asking the Court to dismiss Audible Magic's counterclaim 12 with prejudice. Those objections are pending before the Court, along with Blue Spike's objections to the Magistrate Judge's September 11, 2015 Report and Recommendation that recommends Audible Magic's motion

review of the Magistrate Judge's findings and conclusions.

The Magistrate Judge, after extensive briefing and a hearing, issued a detailed, 36-page Report and Recommendation, recommending Blue Spike's motion for summary judgment on Audible Magic's counterclaims 9-13 be denied. In its objections, Blue Spike asserts Audible Magic cannot prevail on its inequitable conduct counterclaim (no. 9) because Audible Magic cannot show Moskowitz failed to disclose material information to the Patent Office or that Moskowitz intentionally deceived the Patent Office. Blue Spike further asserts Audible Magic's Lanham Act counterclaim (no. 11) fails as a matter of law because Blue Spike's speech is protected, and Audible Magic cannot show the implicated statements deceived or had the capacity to deceive a substantial segment of potential customers. Blue Spike also objects to the Magistrate Judge's findings as to Audible Magic's unjust enrichment counterclaim (no. 10) and unfair competition counterclaim (no. 13).

In response, Audible Magic asserts the Magistrate Judge thoroughly analyzed the issues and properly determined the counterclaims at issue should proceed to trial. The Court agrees, finding Blue Spike's objections without merit. The Court is of the opinion that the findings and conclusions of the Magistrate Judge are correct. Therefore, the Court hereby adopts the Report of the United States Magistrate Judge as the findings and conclusions of this Court. Accordingly, it is hereby

ORDERED that Blue Spike, LLC, Blue Spike, Inc., and Scott Moskowitz's Motion for Summary Judgment on Audible Magic Counterclaims 9-13 (Dkt. No.14) is **DENIED**.

SIGNED this 28th day of March, 2016.

for summary judgment of non-infringement be granted.


 ROBERT W. SCHROEDER III
 UNITED STATES DISTRICT JUDGE